Supreme Court, U.S.
FILED
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No. 07-355

In the
Supreme Court of the United States

XIONG HUANG,

Petitioner,

v.

ALBERTO GONZALES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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September, 2007

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QUESTION PRESENTED

I. Whether the Court of Appeals has jurisdiction to review a question of law related to the discretionary denial of adjustment of status where Petitioner claims that the denial was legally improper based on the grant of an INA § 212(i) waiver?

PARTIES AND COUNSEL IN PROCEEDINGS BELOW

Xiong Huang	Alberto Gonzales/INS
Represented by:	Represented by:

Immigration Court:

Pro se	Office of Chief Counsel 2901 Metro Dr, Suite 501 Bloomington, MN 55425

Board of Immigration Appeals

Richard L. Breitman 2901 Metro Dr. Bloomington, MN 55425	(same as above)

Eighth Circuit Court of Appeals:

Bruno Joseph Bembi 62 Nichols Court Suite 202 Hempstead, NY 11550-0000	Richard Evans Patricia Smith Scott Watson Office of Immigration Litigation U.S. Department of Justice PO Box 878 Ben Franklin Station Washington, DC 20044

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OPINION BELOW

The opinion of Court of Appeals for the Eighth Circuit was entered on April 4, 2007, under the caption Huang v. Gonzales, No. 05-2724 (8th Cir. 2005)(unpublished). The decision is attached hereto as Appendix A. Petitioner filed a timely Petition for Rehearing. The Petition for Rehearing was denied on June 14, 2007. The Order is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 4, 2007. The Eighth Circuit Court of Appeals had jurisdiction over this matter under 8 U.S.C. § 1252 as there had been a final adjudication on the merits by the Board of Immigration Appeals on May 7, 2003.

This Petition for Writ of Certiorari has been filed and docketed within the time limits prescribed as it was mailed within 90 days of the date the Petition for Rehearing was denied.

Thus, the jurisdiction of this Court is properly invoked.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. § 1252(a)(2):

(B) Denials of discretionary relief.
Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28 United States Code, or any other habeas corpus provision, and sections

1361 and 1651 of such title, and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245 [8 USC § 1182(h), 1182(i), 1229b, 1229c, or 1255], or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 208(a) [8 USC § 1158(a)]

(D) Judicial Review of Certain Legal Claims
Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

INA 212(i):

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of an alien granted classification under clause (iii) or (iv)

of section 204(a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in the instant case to address the scope of review for federal courts under 8 U.S.C. § 1252(a)(2)(B) and (D). Petitioner does not dispute that purely discretionary decisions, including the discretionary denial of adjustment of status, are not subject to judicial review. However, the jurisdiction-stripping provisions under 8 U.S.C. § 1252(a)(2) do not apply to constitutional claims or questions of law even if those claims or questions are related to the denial of an adjustment of status application. In the instant case, the Eighth Circuit erroneously found that Petitioner's claim must be dismissed because it challenged the denial of adjustment of status. This overlooks the fact that there are circumstances in which a discretionary form of relief can be denied on an improper legal basis or under an improper legal standard. See Khan v. Gonzales, ___F.3d ___, 2007 WL 2127712, *2 (2d. Cir. 2007). In the instant case, the only issue raised in Petitioner's Petition is the legal consequence of being granted a waiver under INA § 212(i). Petitioner argued that the grant of the waiver precluded a discretionary denial of adjustment of status based on the same fraud/misrepresentations that had been waived by a grant of the waiver. The legal issue as to the impact of the waiver was the sole issue and was subject to review.

The Eighth Circuit's decision is inconsistent with 8 U.S.C. § 1252 and the law of the Second Circuit. See also Ramadan v. Gonzales, 479 F.3d 646 (9th Cir. 2007)(alien's challenge to BIA's determination that her untimely filing of the asylum application was not excused by changed circumstances is a mixed question of law and fact that is subject to review). This Court should grant certiorari to address what aspects of a discretionary denial can be reviewed by a Court of Appeals. See Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315 (2nd Cir. 2006)(finding that a question of law can be found in some instances in petitions to review a discretionary denial of an IJ's decision); Khan, at *3. A petition is not barred under 8 U.S.C. § 1252 simply because an individual challenges some aspect of the denial of a discretionary form of relief. If the denial is legally impermissible or if the incorrect legal standard was utilized, those decisions can be reviewed in a petition for review.

In the instant case, a remand to the Eighth Circuit Court of Appeals is appropriate. The Court never addressed the exception set forth in 8 U.S.C. § 1252(a)(2)(D) and its applicability to Petitioner's case. Thus, Petitioner's legal challenge to the denial of his adjustment of status application was never addressed on the merits. The Court concluded that any challenge to the denial of an adjustment of status application is not subject to review. This is erroneous.

For the reasons set forth herein, the writ should be granted for review of this extremely important issue.

STATEMENT OF THE CASE AND FACTS

Petitioner is a native and citizen of China. He is an applicant for adjustment of status. He applied for adjustment

of status with the Immigration Court based on his marriage to a United States citizen.

The Immigration Court conducted the adjustment of status hearing. Due to his prior misrepresentations and fraud, Petitioner also sought a waiver of the fraud/misrepresentations in conjunction with his adjustment of status application. A waiver under INA § 212(i) was necessary. After a hearing on the adjustment of status application and the waiver, the Immigration Judge found that Petitioner warranted a grant of a 212(i) waiver. However, the Judge denied adjustment of status as a matter of discretion despite granting the waiver.

Petitioner appealed the decision to the Board of Immigration Appeals. On May 7, 2003, the Board affirmed the decision of the Immigration Judge.

Petitioner filed a timely Petition for Review with the Eighth District Court of Appeals. The sole issue raised was the legal consequence of the grant of a 212(i) waiver. Petitioner made the legal argument that a grant of the 212(i) waiver precluded a denial of adjustment of status as a matter of discretion where the sole basis for a negative exercise of discretion was the fraud and misrepresentations that had been waived.

On April 4, 2007, the Eighth Circuit denied the Petition for Review on the ground that it lacked jurisdiction to review the Attorney General's discretionary decision to deny adjustment of status. The Petition for Rehearing was denied.

ARGUMENT

I. The appellate court erroneously dismissed Petitioner's Petition where his sole claim was a legal question related to the consequence of being granted a waiver under INA § 212(i).

The appellate court erroneously dismissed Petitioner's Petition where his sole claim was a legal question related to the consequence of being granted a waiver under INA § 212(i). He was not challenging the discretionary determination of the Immigration Judge.

Under 8 U.S.C. § 1252(a)(2)(B), Congress has precluded judicial review of decisions regarding the granting of relief under INA § 245, which is the section pertaining to adjustment of status. However, subsection (D) provides an exception for and allows review of a constitutional claim or question of law. The Eighth Circuit overlooked this section and found that subsection (B) precluded review.

The instant petition involves a question of law relating to the impact of a grant of an INA § 212(i) waiver. Petitioner argued that the grant of a INA § 212(i) waiver precludes a discretionary denial of adjustment of status on the basis of fraud since the fraud was waived by the waiver. The Eighth Circuit never addressed the merits of this argument as the Court found the Petition barred by 8 U.S.C. § 1252(a)(2)(D).

To determine whether a federal court has jurisdiction to review a claim under the exception set forth in 8 U.S.C. § 1252(a)(2)(D), the court must review the arguments asserted. Chen, 471 F.3d at 329. In Khan, the Second Circuit held that where a petitioner argues that the agency applied an erroneous legal standard in making a discretionary

determination, the petitioner raises a question of law, which the court has jurisdiction to review. Khan, at *3.1

In the instant case, the Eighth Circuit's decision states that since Huang only challenges the IJ's refusal to grant him adjustment of status, his claim is precluded by 8 U.S.C. § 1252(a)(2)(B)(i) because adjustment of status is within the discretion of the Attorney General. The decision does not mention the exception under subsection (D) for constitutional issues or questions of law. The only conclusion that can be drawn from the Eighth Circuit's decision is that the Court erroneously believes that no claim related to the denial of an adjustment of status application can be reviewed by a federal court. This is contradicted by the plain language of the statute. Petitioner's position is supported by Second Circuit case law where that Court concluded that there are some aspects of a discretionary denial that may be reviewed.

Although Petitioner does challenge the decision denying adjustment of status, he does not challenge any discretionary decision. He is challenging the legal basis for the decision in light of the grant of an INA § 212(i) waiver.

A waiver under INA § 212(i) waives the underlying fraud or misrepresentation if the alien establishes extreme hardship to a qualifying relative. In determining whether to grant a waiver under INA § 212(i), the initial fraud requiring the waiver can be a factor in determining whether a waiver is

---

[1] Although Khan's underlying legal argument regarding the application of the correct legal standard lacked merit, the Second Circuit concluded that it had jurisdiction to review this issue and make the determination about whether the proper standard was articulated and applied.

warranted. Matter of Cervantes, 22 I&N Dec. 560, 569 (BIA 1999).

In the instant case, the IJ exercised its discretion to grant a waiver under INA § 212(i). The waiver had the effect of waiving the underlying ground of inadmissibility due to the misrepresentations/fraud. However, the Judge then denied adjustment of status as a matter of discretion. The denial was based solely on the fraud and misrepresentations that the Judge had waived by granting the INA § 212(i) waiver. Petitioner's argument is that the IJ was without legal authority to deny the adjustment application based on the conduct that required a waiver since the Judge had already granted the waiver. A grant of the 212(i) waiver, which necessarily involves a weighing of the fraud/misrepresentations in determining whether an exercise of discretion is appropriate, precludes a denial of the adjustment application based on the same conduct.

Petitioner raised a question of law in his Petition for Review. This question was never addressed on the merits in light of the Eighth Circuit's position that any determination related to an adjustment of status denial is not subject to review. The Eighth Circuit's decision is in conflict with the statute and law from outside the Eighth Circuit. The Court did not engage in any analysis to even determine whether there was a question of law raised in the petition. Accordingly, the decision of the Eighth Circuit must be vacated and the case remanded for an analysis of Petitioner's question of law on the merits.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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Attorney for Petitioner

Date: September 12, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 05-2724

[Filed June 14, 2007]

Xiong Huang,	)
Petitioner	)
	)
v.	)
	)
Alberto Gonzales,	)
Attorney General of the	)
United States of America,	)
Respondent	)
	)

Petition for Review of a Decision
of the Board of Immigration Appeals
(A 73 638 874)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 14, 2007

Order Entered at the Direction of the Court:
Clerk, US. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 05-2724

[Filed April 4, 2007]

Xiong Huang,	)
Petitioner,	)
	)
v.	)
	)
Alberto Gonzales,	)
Attorney General of the	)
United States of America,	)
Respondent.	)
	)

Petition for Review of a Final Decision
of the Board of Immigration Appeals

[UNPUBLISHED]

Submitted: February 16, 2007
Filed: April 4, 2007

Before WOLLMAN, BYE, and SMITH, Circuit Judges.

PER CURIAM.

Xiong Huang, a native and citizen of China, petitioned for asylum. The Immigration Judge (IJ) denied his asylum petition. The Board of Immigration Appeals (BIA) affirmed. Huang now seeks review. We deny the petition for review.

Huang entered the United States illegally. He originally petitioned for asylum in 1994. After obtaining new counsel, he filed a second petition in 1998, requesting an adjustment of status based upon his recent marriage to a naturalized American citizen. The second asylum petition also claimed that Huang would be persecuted if returned to China because he opposed the nation's one-child policy. The IJ found that Huang's persecution claim lacked credibility. The IJ also refused to grant Huang the adjustment of status and denied his petition for asylum.

Huang appeals, challenging only the IJ's refusal to grant him an adjustment of status. Adjustment of status is entirely within the discretion of the Attorney General. *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 862 (8th Cir. 2002); 8 U.S.C. § 1255. Congress has stripped the courts of jurisdiction to review decisions executed pursuant to that discretion. 8 U.S.C. § 1252(a)(2)(B)(i) ("[N]o court shall have jurisdiction to review... any judgment regarding the granting of relief under section...1255 of this title..."); *Grass v. Gonzales*, 418 F.3d 876, 878 (8th Cir. 2005). Because we lack jurisdiction to review the Attorney General's discretionary decision to deny an adjustment of status, Huang's petition is dismissed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-2724

[Filed April 4, 2007]

Xiong Huang,	)
Petitioner,	)
	)
v.	)
	)
Alberto Gonzales, Attorney General	)
of the United States of America,	)
Respondent.	)
	)

Petition for Review of a Decision of the
Board of Immigeation Appeals
(A 73 638 874)

JUDGMENT

This cause was submitted on petition for review of an order from the Board of Immigration Appeals, on the original record and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the petition for review is dismissed in accordance with the opinion of this court.

Order Entered in Accordance with Opinion:
Clerk, U.S, Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73 638 874 - Bloomington

Date: MAY -7 2003

In re: XIONG HUANG

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard L. Breitman, Esq.

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or wilful misrepresentation of a material fact

APPLICATION: Adjustment of status, waiver of inadmissibility pursuant to section 212(i) of the Act, voluntary departure

ORDER:

PER CURIAM. We affirm the decision of the Immigration Judge. See *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). The respondent's appeal from the Immigration Judge's May 28, 2002, decision finding him removable as charged and denying his application for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a), as a matter of discretion, but granting his request for a waiver on inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i); as well as his request for request for voluntary departure pursuant to section 240B(b)(1), 8 U.S.C. § 1229c(b)(l), will be dismissed.

The respondent asserts that he is eligible for adjustment of status. The grant of adjustment of status is a matter of discretion and administrative grace, and the applicant has the burden to show that discretion should be exercised on his behalf. *See Matter of Leung,* 16 I&N Dec. 12 (BIA 1976); *Matter of Arai,* 13 I&N Dec. 494 (BIA 1970). Nevertheless, in determining whether a grant of relief is merited in discretion, an Immigration Judge must consider all of the favorable and negative factors.

On appeal, the respondent merely reiterates his family ties to the United States and his desire to remain in this country while maintaining that he has learned from his mistakes and will continue to abide by the laws of the United States. The respondent does not address the negative factors relied upon by the Immigration Judge in his decision, such as the repeated

instances of fraud and dissembling at the hearing and the fact that he was a willing participant in the fraud perpetrated by the Borges law firm because he wanted to get his employment authorization (Tr. at 133-34). The Immigration Judge found that the respondent was undeserving of the relief of adjustment of status as a matter of discretion. We find no error in his decision. The respondent raises no arguments and lists no facts in his Notice of Appeal (Form EOIR-26) or his appeal brief which were not addressed by the Immigration Judge or which would cause us to reverse the Immigration Judge's decision. Accordingly, the appeal will be dismissed.

FURTHER ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the district director, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A,

245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/

FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION PREVIEW
IMMIGRATION COURT
BLOOMINGTON, MINNESOTA

[May 28, 2002]

IN THE MATTER OF:	)
	)
Xiong HUANG,	)
Respondent.	)
	)
FILE NUMBER: A73-638-874	)
	)

IN REMOVAL PROCEEDINGS

CHARGE:	**Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as an alien who is present in the United States without being admitted or paroled after inspection by an Immigration officer.**
APPLICATIONS:	**Section 245 of the Immigration and Nationality Act, adjustment of status to that of a permanent resident.**

Section 212(i) of the Immigration and Nationality Act, waiver of inadmissibility for fraud or misrepresentation.

Section 240B of the Immigration and Nationality Act, voluntary departure.

APPEARANCES: **On behalf of Respondent: Pro Se.**

On behalf of the Immigration and Naturalization Service: Richard Soli, District Counsel.

DECISION AND ORDER OF THE IMMIGRATION JUDGE

1. Introduction and Procedural Summary

Respondent is a 28 year old married male, who is a native and citizen of the People's Republic of China, who apparently entered the United States on October 17, 1994, at New York City. Although it is charged in the Notice to Appear (NTA) that he entered the United States without inspection, he most recently has testified that he actually entered the United States with a fraudulent passport in another person's name, supplied to him by "snakeheads," Chinese smugglers.

Removal proceedings were commenced on April 17, 1998, by the filing with the Immigration Court of the NTA, which has been marked Exhibit 1. That document charges the Respondent with being subject to removal as an alien who is present without being admitted or paroled.

At a master calendar hearing in New York City on May 26, 1998, Respondent admitted the factual allegations set forth in the NTA, and conceded the charge contained therein. Respondent declined to designate a country for removal, and the court designated China, PRC. Based on Respondent's admissions, he was found removable as charged, by evidence that was clear, convincing and unequivocal. *Woodby v. INS*, 385 U.S. 276 (1966). As was developed in later testimony, Respondent's admission of an entry without inspection was false.

Regarding relief from removal, Respondent had filed applications for asylum and related relief, which applications are marked Exhibits 5, 6 and 10. The first application, (Exhibit 6), was filed with the INS Asylum Office in 1994, and the subsequent applications were filed and updated through September 5, 2000 (Exhibit 10). As will be discussed *infra*, these applications are simply fabrications and frauds, carried out by the Respondent and dishonest lawyers.

The Respondent ultimately married a United States Citizen, who filed a visa petition on behalf of the Respondent. That petition was approved, and Respondent seeks adjustment of status (Exhibit 3), and a waiver of his fraud through a form I-601 (Exhibit 16). The Respondent testified in support of his applications, as well as did his Wife. Both sides submitted additional documentation.

2. The Evidence Submitted

Initially, the court would note that this is not an asylum case. The Respondent submitted fraudulent asylum applications to both the INS Asylum Office and to the Immigration Court. As was brought out in Respondent's testimony, these applications have no basis in fact. Rather,

they were submitted to allow the Respondent to remain in this country and obtain employment authorization.

What is left for the court to consider is Respondent's application or adjustment status based on his marriage to United States citizen, and a waiver of inadmissibility for his fraud. In addition, the Respondent seeks voluntary departure in the alternative.

At master calendar hearings before the Immigration Court in New York on May 26, 1998, and May 7th, 1999, the record reflects the Respondent was still pursuing his fraudulent asylum claims. It was not until after the Respondent married a United States citizen, and a new means about obtaining permanent resident status became available to him, did he cease pursuing his asylum application. The Court would note that the Respondent was represented before the court in New York by the Porges law firm. Based on subsequent developments regarding that law firm, it has become obvious that the Porges' firm's principal product was fraudulent asylum applications for individuals from China who had been brought into the United States by "snakeheads."

Respondent testified before this court on May 17, 2002. He stated that he entered United States on October 17, 1994. He had been living in Fuzhou, China, before that. He stated that conditions in China were not "suitable" for him. There were poor job prospects. He stated that he had never been harassed or persecuted by the government of China. He never belonged to any anti-government groups. He simply left China for economic reasons.

To effect his departure from China, Respondent's family raised money from friends and relatives. About $15,000 was

raised by the family and was paid to a "snakehead" to smuggle the Respondent to the United States. Respondent boarded a plane in Dalien, China, and was given a Japanese or Korean passport by the "snakehead." This passport had a visa for entry into the United States. Respondent was also provided with tickets for his travel. The plane stopped in Japan and then flew on to New York City. Respondent was asked some questions at the airport, but was able to be admitted to the United States with the false document. After entry, the Respondent gave the passport back to a "snakehead" in New York City, presumably for further improper use. The Respondent then went to live with a "cousin," Xiao Xing, in New York's Chinatown. Regarding his 1994 application for asylum, Respondent stated that he saw a poster on the street advertising an attorney, and he went to the attorney for assistance in filling out the application.

In response to questions from the INS attorney, Respondent stated that he is a co-owner of a restaurant in Faribault, Minnesota. He initially stated that the other co-owner of the restaurant was a Huang Zhen, an individual that the Respondent initially identified as his "cousin." He first testified that this person was not his brother. However, when confronted by the INS attorney with the fact that a Huang Zhen was listed in Respondent's household register as a brother, Respondent finally admitied that the co-owner of the restaurant was his brother. The INS attorney pointed out that Respondent's brother was under an order of deportation issued by the Immigration Court in New York. It appeared that Respondent was attempting to conceal the whereabouts of his brother from the INS, and initially provided false testimony to this Court as to the identity of the co-owner of his restaurant. Respondent finally acknowledged that he and his brother had moved from New York to Minnesota to avoid his brother being arrested by the INS.

Regarding the asylum applications that the Respondent had filed in New York, he stated that he made these false applications because he wanted to obtain documentation to work. The Respondent was aware of the false information being included in his applications for asylum. It is the Court's view of Respondent's testimony that he knowingly pursued these false applications because he felt that it was in his economic interest, and because he did not think he would get caught. He attended an interview at the INS Asylum Office, accompanied by one of Porges' interpreters. Respondent claims that he really did not know what the interpreter said on his behalf at the interview. Respondent does not owe any money to any "snakehead" at this time, and has no fear of the "snakeheads" in returning to China.

Regarding hardship, Respondent emphasized strongly that he has started a business here in Minnesota. If he were to leave the United States he would lose this business. The Respondent bought a home in Minnesota about one year ago. He has an equity of about $30,000 in the home. Respondent has one child born in the United States, a very young son. Respondent stated that he does not have any fears of persecution by the government if he were to return to China.

The next witness to testify was Respondent's wife, Kelly Huang. She is a naturalized United States citizen, having been born in Shanghai, China. She married the Respondent on September 9, 1999. They have one child together. This witness testified that she really had no knowledge of any fraud that had been engaged in by the Respondent. However, this witness also initially lied to the court regarding the whereabouts of Respondent's brother. It was only when confronted by the INS attorney regarding information about the brother, that she acknowledged that the brother was living

in Faribault and working at the restaurant co-owned by the Respondent.

The Court will note the following from the exhibits in this case: Exhibit 3 is Respondent's application for adjustment of status. He did not mark yes to the question which deals with use of fraudulent documents or misrepresentation of material facts, or fraud, in dealing with immigration-related matters.

Exhibit 5 is the asylum application filed by Respondent in March of 1998, and which had been prepared by attorney How Chan. The corrections made by the asylum officer, presumably as a result of information supplied by Respondent at the interview, include a reference to the Respondent entering the United States across the United States/Mexico border. The Respondent claimed to have been detained for two weeks by the Chinese government because of a composition he wrote criticizing the government. There is a detailed statement attached to the application, which outlines the fabricated claims of harassment and abuse of the Respondent in China.

Exhibit 6 is the original handwritten asylum application prepared by the Respondent in October of 1994. In this document he claimed to be a stowaway. In the attachment to this document he claims involvement in the June 4th, 1989, democratic movement in China. He claims to have supported the Beijing student democratic movement. As a result of this support, policeman came to his home on three occasions looking for him.

Exhibit 9 is a filing by the Porges law firm in New York. Included in this submission is what purports to be statements from individuals in China reporting that police were looking for the Respondent because of a composition he wrote in

school. To the extent that anything can be believed that originated from the Porges law firm, one of these false affidavits comes from Respondent's mother. Exhibit 10 is an amended asylum application submitted by the Porges law firm on September 5, 2000.

3. Analysis.

Removability in this case is not seriously in dispute. The Respondent entered the United States with a false passport supplied him by smugglers, crediting his final testimony in the case. In light of the preceding claims to entry as a stowaway, or the previously-conceded entry without inspection across the Mexican border, the court is not inclined to require any sort of an amendment to the notice to appear. Respondent is in the United States illegally after having paid "snakeheads" to bring him into this country.

The only issue that remains for consideration is whether or not the Respondent qualifies for any relief from removal. He has abandoned any asylum claims, and his testimony reflects that he was never subjected to any abuse or harassment in China. The only applications that he is pursuing at this time relate to adjustment of status, waiver of inadmissibility, and voluntary departure in the alternative.

Initially, the court will comment on the Respondent's credibility. He has clearly shown a willingness in the past to lie when it services his purposes, particularly his economic interests. Even as late as the final hearing of the case, he attempted to mislead the Court and the INS attorney regarding the whereabouts of his brother, the co-owner of Respondent's restaurant. It is apparent to the Court, and is now conceded by the Respondent, that he submitted a great deal of fraudulent evidence regarding his asylum claim. In light of this track

record, the court is reluctant to simply accept any of the testimony of the Respondent. This does not mean that the court is disregarding his marriage to U.S. citizen, or his United States citizen child. Rather, the court will simply be reluctant to accept everything that the Respondent states at face value.

Moving to the merits of the Respondent's applications for relief, the court believes that the best way to dispose of these applications is by considering them together, rather than in isolation. The Court hopes to do justice as a whole, to achieve a final result that is both fair to the Respondent and his family, while also providing proper respect for the integrity of the immigration laws of the United States. The court does not seek to impose a permanent bar on this Respondent's ability to obtain permanent residence in the United States. Accordingly, the court will grant the Respondent's application for a waiver under section 212(i) of the act. This is done strictly in the interests of Respondent's wife and child. They are a strong equity in the Respondent's favor. He has no criminal record in the United States. In light of the Respondent's lengthy and remarkable history of fraud, the court has no interest in benefiting him individually. Balancing the fraudulent behavior of the Respondent against the hardship to his United States citizen family members were he to be permanently excluded, the court will exercise its discretion favorably to grant this waiver. See *Matter of Tijam*, Int. Dec. 3372 (BIA 1998); *Matter of Mendez-Moralez, Int. Dec. 3272 (BIA 1996).*

However, the Court will deny the Respondent's the application for adjustment of status in the exercise of discretion. The Respondent came to the United States strictly for economic reasons. He paid $15,000 to a "snakehead" to bring him to this country. He committed egregious asylum

fraud to be able to obtain employment authorization to improve his economic circumstances in this country. He requests that the court grant him adjustment of status primarily because of economic concerns. If the Respondent faces economic problems, including the potential loss of his restaurant, we must keep in mind that the economic equities he built up in this country directly flow from the outrageous asylum fraud that he engaged in to remain here for eight years following a fraudulent entry.

It is because of people like the Respondent (and the dishonest attorneys who worked hand in hand with him) that many legitimate asylum applicants are subjected to additional scrutiny and skepticism of their claims. The Respondent appears to have been more than happy to use the services of dishonest attorneys to further his economic ends. What is equally of concern to the court is that this Respondent does not seem to be the least bit sorry about his having perpetrated this fraud on the United States government. I still do not believe that this Respondent understands that his actions were both immoral and criminal. He only seems to be concerned with his financial status. This court is concerned about the integrity of the immigration laws of the United States, and the asylum system that is one of the cornerstones of the immigration laws.

Applying the standard set forth by the Board of Immigration Appeals in *Matter of Arai*, Int. Dec. 2027 (BIA 1970), this court feels that it is quite appropriate to make this Respondent pursue the immigrant visa process outside the United States. This would be an appropriate penalty for him to pay in light of his history of fraud, and such a result hopefully will serve as a deterrent to others who feel that they can lie to this government for years, reap the benefits of those lies, and then simply walk away from any consequences when

a means of obtaining permanent residence subsequently becomes available to them. There must be consequences for fraud of this type. This decision is being made in the context of the exposure of the Porges law firm as a monumental facilitator of fraudulent asylum applications for individuals in similar circumstances to this Respondent. It is only when significant negative consequences are applied to all the individuals who engage in such fraud will such misconduct ever come to an end. If anything, this court may be subject to criticism for granting the Respondent's application for a waiver of inadmissibility. Respondent's application for adjustment of status is denied in the exercise of discretion.

The court will grant Respondent voluntary departure for 60 days upon payment of a voluntary departure bond in the sum of $1,500.00.

The following orders will be entered in this case:

Respondent is found to be removable from the United Stat as charged in the Notice to Appear.

Respondent's applications for asylum, withholding of removal, and Torture Convention relief are denied.

Respondent's application for a waiver of inadmissibility under section 212(i) of the Act is granted.

Respondent's application for adjustment of status under section 245 of the Act is denied in the exercise of discretion.

Respondent is granted the privilege of voluntarily departing United States on or before July 27th, 2002. A condition of the grant of voluntary departure is that

Respondent must post a voluntary departure bond with the Immigration & Naturalization Service in the sum of $1,500.00 within eight business days of the date of this order. If Respondent shall fail to depart within the time set, or shall fail to timely post the voluntary departure bond, the above order shall be withdrawn without further notice or proceedings, and the following order shall become immediately effective: Respondent shall be removed from the United States to the People's Republic of China on the charge in the Notice to Appear.

Date: May 28, 2002

/s/
Joseph R. Dierkes, Immigration Judge

No. 07-355

In the Supreme Court of the United States

XIONG HUANG, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the agency's discretionary denial of petitioner's application for adjustment of status under 8 U.S.C. 1255 (2000 & Supp. V 2005).

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In the Supreme Court of the United States

No. 07-355

XIONG HUANG, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) is not published in the Federal Reporter but it is reprinted at 224 Fed. Appx. 554. The decisions of the Board of Immigration Appeals (Pet. App. 6a-9a) and the immigration judge (Pet. App. 10a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2007. A petition for rehearing was denied on June 14, 2007 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 245 of the Immigration and Nationality Act (INA), 8 U.S.C. 1255 (2000 & Supp. V 2005), pro-

vides that the Attorney General may, in his discretion, adjust the status of an alien inspected and admitted into the United States to that of a lawful permanent resident. Several prerequisities must be met, including that the alien must be "admissible to the United States for permanent residence." 8 U.S.C. 1255(a)(2). Even if all of the statutory prerequisities are met, adjustment is not automatic. "The grant of an application for adjustment of status under section 245 is a matter of administrative grace," and the applicant "has the burden of showing that discretion should be exercised in his favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980). Whether a particular applicant warrants a favorable exercise of discretion is a case-specific determination that depends upon whether the applicant has demonstrated that any adverse factors present in his application are "offset * * * by a showing of unusual or even outstanding equities." *In re Arai*, 13 I. & N. Dec. 494, 495-496 (B.I.A. 1970).

Under the INA, certain classes of aliens are inadmissible for permanent residence and thus ineligible for adjustment of status under Section 245. As pertinent here, an alien who attempts to gain an immigration benefit by fraud or willful misrepresentation of a material fact is inadmissible. 8 U.S.C. 1182(a)(6)(C)(i). However, Section 212(i) of the INA grants the Attorney General the discretionary authority to waive the application of that provision "if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien." 8 U.S.C. 1182(i)(1); see 8 U.S.C. 1182(a)(6)(C)(iii). Whether an applicant is eligible for a Section 212(i) waiver is a case-specific de-

termination that depends upon whether he demonstrates that his removal would cause "extreme hardship" to a United States citizen or lawfully resident spouse or parent. *E.g.*, *In re Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 565-566 (B.I.A. 1999).

b. Since 1996, the INA has barred federal-court review of certain decisions made by the Attorney General in immigration cases. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-607. As pertinent here, the INA provides:

> [N]o court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1255 of this title.

8 U.S.C. 1252(a)(2)(B)(i).

In 2005, Congress qualified that jurisdictional bar by providing:

> Nothing in subparagraph (B) * * * which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D) (Supp. V 2005) (as added by REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310).

2. Petitioner is a native and citizen of China who entered the United States illegally in 1994. Pet. App. 11a. In April 1998, the former Immigration and Naturalization Service (INS) initiated removal proceedings, charging petitioner with removability because he is an alien present in the United States without having been

admitted or paroled. *Id.* at 10a-11a; see 8 U.S.C. 1182(a)(6)(A)(i).

Before the immigration judge (IJ), petitioner conceded his removability but sought asylum. Pet. App. 12a. In two separate asylum applications, petitioner claimed that he was involved in the Beijing student democratic movement, that "police were looking for [him] because of a composition he wrote in school," and that he would be persecuted if he returned to China. *Id.* at 16a-17a. Petitioner later admitted, however, that his applications were fraudulent, that he knew they were fraudulent, and that he submitted them in order to remain in the United States long enough to obtain employment authorization. *Id.* at 12a-17a.

Petitioner then married a United States citizen, abandoned his asylum applications, and sought a discretionary adjustment of status under Section 245 based on an approved relative visa petition filed by his wife. Pet. App. 12a-13a, 16a. In order to be eligible for adjustment of status in light of his previous fraud, petitioner also applied for a discretionary waiver of inadmissibility under Section 212(i). *Id.* at 12a. In the alternative, petitioner requested voluntary departure. *Id.* at 13a.

3. a. The IJ found petitioner removable as charged, granted his requests for a waiver of inadmissibility and voluntary departure, and denied his application for adjustment of status. Pet. App. 17a-21a. Reviewing the evidence, the IJ noted that petitioner worked with smugglers to enter the United States using a false passport and that he repeatedly lied to immigration officials about numerous matters, including the circumstances of his entry into the United States and the whereabouts of his brother (who was under an order of deportation). *Id.* at 11a, 13a-14a, 17a-19a. The IJ also found that peti-

tioner filed fraudulent asylum applications in 1994 and 1998 and continued "pursuing his fraudulent asylum claims" until he married a United States citizen and "a new means [for] obtaining permanent resident status became available." *Id.* at 13a. And the IJ noted petitioner's admissions "that he had never been harassed or persecuted by the government of China," but that he "simply left China for economic reasons," *i.e.*, because "[t]here were poor job prospects" there. *Ibid.* In sum, the IJ found that petitioner "has clearly shown a willingness to lie in the past when it serv[es] his purposes, particularly his economic interests." *Id.* at 17a.

The IJ granted petitioner's application for a Section 212(i) waiver of inadmissibility "strictly in the interests of [petitioner's] wife and child," so that petitioner would not be "permanent[ly] bar[red]" from obtaining permanent residence in the United States. Pet. App. 18a. The IJ determined that, despite petitioner's fraudulent behavior, the potential hardship that permanent exclusion could cause his family warranted a Section 212(i) waiver. *Id.* at 18a, 20a.

The IJ then considered whether to exercise his discretion to grant petitioner's application for adjustment of status under Section 245. Pet. App. 18a. He explained that petitioner came to the United States "strictly for economic reasons"; that he entered the United States illegally with the help of smugglers; that he "committed egregious asylum fraud to be able to obtain employment authorization"; and that he lied to immigration officials regarding the whereabouts of his brother. *Id.* at 17a-19a. The IJ also noted that petitioner owns a home and business in the United States, but explained that "the economic equities [petitioner] built up in this country flow directly from the outrageous asylum fraud"

he perpetrated for eight years. *Id.* at 15a, 19a. Moreover, the IJ determined that petitioner did "not seem to be the least bit sorry about his having perpetrated this fraud on the United States government." *Id.* at 19a. After weighing the positive and negative equities, the IJ concluded that petitioner did not warrant a favorable exercise of discretion and denied his application for adjustment of status. *Id.* at 18a-20a. The IJ then granted petitioner voluntary departure. *Id.* at 20a.

b. The Board of Immigration Appeals (BIA) affirmed. Pet. App. 6a-9a. Noting that "[t]he grant of adjustment of status is a matter of discretion and administrative grace," the BIA found "no error" in the IJ's discretionary denial of petitioner's application for adjustment of status. *Id.* at 7a-8a. It noted that petitioner "raise[d] no arguments and list[ed] no facts" on appeal that the IJ had not already considered, instead "merely reiterat[ing] his family ties to the United States and his desire to remain in this country" without "address[ing] the negative factors relied upon by the Immigration Judge in his decision, such as the repeated instances of fraud" petitioner perpetrated. *Ibid.* The BIA found that the IJ considered all of the positive and negative factors and permissibly concluded that petitioner "was undeserving of the relief of adjustment of status as a matter of discretion." *Id.* at 8a.

Finally, the BIA noted that petitioner would be permitted voluntarily to depart the United States within 30 days. Pet. App. 8a. Petitioner has not voluntarily departed the United States.

4. The court of appeals dismissed petitioner's petition for review in an unpublished, per curiam opinion.

Pet. App. 3a-4a.[1] The court of appeals observed that "[a]djustment of status is entirely within the discretion of the Attorney General" and that Congress has generally precluded federal-court review of "decisions executed pursuant to that discretion." *Id.* at 4a; see 8 U.S.C. 1252(a)(2)(B)(i). The court then concluded that it lacked jurisdiction to review petitioner's arguments and dismissed his petition for review. Pet. App. 4a, 5a.

ARGUMENT

Petitioner contends (Pet. 3-4, 6-8) that the court of appeals erred in dismissing his petition for review because, although the BIA's discretionary decision to deny adjustment of status is generally unreviewable under 8 U.S.C. 1252(a)(2)(B)(i), his claim presents a reviewable "question[] of law" under 8 U.S.C. 1252(a)(2)(D). The court of appeals correctly held that it lacked jurisdiction to consider petitioner's challenge to the BIA's discretionary denial of relief, and its decision does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision below is unpublished and non-precedential. Further review is therefore unwarranted.

1. The court of appeals correctly held that it lacked jurisdiction to review petitioner's claim that he merited a discretionary adjustment of status under Section 245. First, the court of appeals correctly recognized that, as a general matter, 8 U.S.C. 1252(a)(2)(B)(i) bars a challenge to a discretionary denial of Section 245 relief. That statutory provision states that "no court shall have

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[1] Petitioner initially filed a timely petition for review with the Second Circuit. No. 03-4965 (filed May 30, 2003). Pursuant to a stipulation between the parties, *ibid.* (filed Feb. 18, 2005), the petition was transferred to the Eighth Circuit.

jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1255 of this title," and petitioner's claim was one for a discretionary adjustment of status under Section 245 of the INA, *i.e.*, 8 U.S.C. 1255. See Pet. 3 (acknowledging that "purely discretionary decisions, including the discretionary denial of adjustment of status, are not subject to judicial review"). That preclusion of judicial review is hardly surprising, because a Section 245 determination is a quintessentially discretionary determination. See 8 U.S.C. 1255(a) ("The status of an alien who was inspected and admitted or paroled into the United States * * * *may be adjusted* by the Attorney General, *in his discretion and under such regulations as he may prescribe*, to that of an alien lawfully admitted for permanent residence." (emphasis added)).

2. Petitioner contends (Pet. 3, 7) that the court of appeals erred in finding that it lacked jurisdiction to consider his claims because he raised a "question[] of law" over which judicial review is permitted under 8 U.S.C. 1252(a)(2)(D). Specifically, petitioner contends (Pet. 6) that his argument is that "the grant of a INA § 212(i) waiver precludes a discretionary denial of adjustment of status on the basis of fraud since the fraud was waived by the waiver," which he characterizes as a legal issue. Petitioner further contends that, because the court of appeals "d[id] not mention the exception under subsection (D) for constitutional issues or questions of law" in finding that it lacked jurisdiction to consider his claim, "[t]he only conclusion that can be drawn" is that the court "erroneously believe[d] that no claim related to the denial of an adjustment of status application can be reviewed by a federal court." Pet. 7. Petitioner is mistaken.

a. As an initial matter, petitioner failed to exhaust his claim that an IJ who grants a discretionary Section 212(i) waiver is required, as a matter of law, to grant discretionary adjustment of status under Section 245. Petitioner's argument to the BIA was that the IJ "abused his discretion" in determining that the equities did not warrant adjustment of status, because the IJ should have placed more weight on the "significant hardship [petitioner's] wife and child would suffer" if he returned to China and less weight on the fact that petitioner "sought to abuse the immigration system." Pet. B.I.A. Br. 4.[2] That argument was a fact-bound challenge to the IJ's exercise of discretion. Petitioner did not contend that the IJ was required to grant Section 245 relief as a matter of law because he had granted a Section 212(i) waiver of inadmissibility. See Pet. App. 7a-8a (BIA notes that on appeal, petitioner "merely reiterate[d] his family ties * * * and his desire to remain in this country while maintaining that he learned from his mistakes," without addressing his "repeated instances of fraud").

Before the court of appeals, petitioner sought to recast his fact-bound claim as a legal argument in order to take advantage of the provision of the INA that permits judicial review of "questions of law." Pet. C.A. Br. 14-17. In response, the government argued that the court of appeals lacked jurisdiction to review petitioner's new

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[2] See Pet. B.I.A. Br. 3 ("The Immigration Judge erred * * * when he failed to consider all of the countervailing equities and hardships to U.S. citizens in making his separate adjudication on the adjustment application."); *ibid.* (arguing that the IJ "ignore[d] and d[id] not analyze the significant equities and hardship to the applicant's family and penalize[d] the applicant by requiring him to travel home to process and obtain an immigrant visa").

claim because petitioner had failed to exhaust it. Gov't C.A. Br. 20-21 (citing 8 U.S.C. 1252(d)(1), which states that a federal court "may review a final order of removal only if * * * the alien has exhausted all administrative remedies available"). The court of appeals apparently agreed, because it held simply that it "lack[ed] jurisdiction to review the Attorney General's discretionary decision to deny an adjustment of status," without specifically addressing petitioner's claim that he raised a "question[] of law." Pet. App. 4a.

The court of appeals' decision was correct, because the INA generally bars review of Section 245 determinations, see 8 U.S.C. 1252(a)(2)(B)(i), and petitioner failed to exhaust the argument that he characterizes as a "question[] of law," see 8 U.S.C. 1252(d)(1). Moreover, because petitioner failed to exhaust his new "legal" claim, and because the court of appeals did not address it, this Court should decline to consider the claim in the first instance.

b. Contrary to petitioner's suggestion, the court below did not hold that "no claim related to the denial of an adjustment of status application can be reviewed by a federal court." Pet. 7. Nowhere in its brief opinion did the court of appeals adopt that categorical legal rule. Instead, the court concluded only that it "lack[ed] jurisdiction" to review the agency's denial of petitioner's adjustment application, Pet. App. 4a, likely because it believed that the only argument petitioner had preserved was his argument that the IJ erred in balancing the equities, a claim clearly barred by 8 U.S.C. 1252(a)(2)(B)(i).

It would be incorrect to infer the categorical rule petitioner asserts from the Eighth Circuit's brief, unpublished opinion, because that court has repeatedly

recognized its authority to consider constitutional claims and questions of law that arise in the context of discretionary determinations by the Attorney General. See, *e.g.*, *Hailemichael* v. *Gonzales*, 454 F.3d 878, 886 (2006); *Suvorov* v. *Gonzales*, 441 F.3d 618, 621 (2006); *Meraz-Reyes* v. *Gonzales*, 436 F.3d 842, 842-843 (2006) (per curiam). Indeed, the courts of appeals (including the Eighth Circuit) have uniformly held both that 8 U.S.C. 1252(a)(2)(B)(i) generally bars review of Section 245 determinations[3] and that 8 U.S.C. 1252(a)(2)(D) permits review of legal questions that arise in the context of discretionary determinations like those under Section 245.[4] Petitioner is thus mistaken in contending (Pet. 3-4, 6-8) that the decision below creates a circuit conflict and "contradict[s] * * * the plain language of the statute" by "overlook[ing] the fact that there are circumstances

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[3] See, *e.g.*, *Bazua-Cota* v. *Gonzales*, 466 F.3d 747, 748 (9th Cir. 2006) (per curiam); *Hailemichael*, 454 F.3d at 886; *Onikoyi* v. *Gonzales*, 454 F.3d 1, 3 (1st Cir. 2006); *Guyadin* v. *Gonzales*, 449 F.3d 465, 468 (2d Cir. 2006); *Hadwani* v. *Gonzales*, 445 F.3d 798, 800 (5th Cir. 2006) (per curiam); *Sokolov* v. *Gonzales*, 442 F.3d 566, 569 (7th Cir. 2006); *Higuit* v. *Gonzales*, 433 F.3d 417, 419 (4th Cir.), cert. denied, 126 S. Ct. 2973 (2006); *Schroeck* v. *Gonzales*, 429 F.3d 947, 950 (10th Cir. 2005); *Zheng* v. *Gonzales*, 422 F.3d 98, 111 (3d Cir. 2005); *Pilica* v. *Ashcroft*, 388 F.3d 941, 945 (6th Cir. 2004); *Gonzalez-Oropeza* v. *United States Att'y Gen.*, 321 F.3d 1331, 1332 (11th Cir. 2003).

[4] See, *e.g.*, *Patel* v. *Gonzales*, 470 F.3d 216, 219 (6th Cir. 2006); *Bazua-Cota*, 466 F.3d at 748; *Hailemichael*, 454 F.3d at 886; *Onikoyi*, 454 F.3d at 3; *Guyadin*, 449 F.3d at 468; *Martinez* v. *United States Att'y Gen.*, 446 F.3d 1219, 1221-1222 (11th Cir. 2006); *Hadwani*, 445 F.3d at 800; *Sokolov*, 442 F.3d at 569; *Higuit*, 433 F.3d at 419; *Schroeck*, 429 F.3d at 951; *Mendez-Reyes* v. *Attorney Gen. of the United States*, 428 F.3d 187, 189 (3d Cir. 2005).

in which a discretionary form of relief can be denied on an improper basis or under an improper legal standard."

Petitioner nonetheless contends (Pet. 3, 4, 6, 8) that the decision below conflicts with other decisions in which courts of appeals have held that they retain jurisdiction over certain challenges to discretionary determinations that raise "questions of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). None of the cases petitioner cites conflicts with the decision below. In *Khan* v. *Gonzales*, 495 F.3d 31, 34-36 (2007), and *Xiao Ji Chen* v. *United States Department of Justice*, 471 F.3d 315, 329 (2006), the Second Circuit stated that it has jurisdiction to consider an argument that the agency applied an incorrect legal standard in making a discretionary determination or an argument that its fact finding was flawed by an error of law. The decision below does not conflict with *Khan* and *Xiao Ji Chen*, because the court of appeals in this case did not hold that it could not review those types of claims; instead, it simply found that it lacked jurisdiction to review petitioner's particular fact-bound claim. Petitioner also cites (Pet. 4) *Ramadan* v. *Gonzales*, 479 F.3d 646 (9th Cir. 2007) (per curiam), but that case is inapposite, because it addressed whether a federal court has jurisdiction to consider the question whether changed circumstances excused the untimely filing of an asylum application, *id.* at 650-656, and this case does not present any question regarding a changed-circumstances determination. Finally, petitioner does not contend that the decision below conflicts with any decision of this Court or presents an issue of such extraordinary importance that this Court's review is warranted. See Sup. Ct. R. 10. Accordingly, this Court should deny review of petitioner's claim.

3. In any event, review is unwarranted because even if the court of appeals had jurisdiction to review petitioner's claim, the claim lacks merit. As petitioner recognizes (Pet. 7), a Section 245 adjustment of status is discretionary, and whether an alien warrants a favorable exercise of discretion depends on the facts of his particular case. *E.g.*, *In re Arai*, 13 I. & N. Dec. 494, 495 (B.I.A. 1970). "Section 245 of the Act reposes with the Attorney General and his delegates the *discretionary* power to grant an adjustment of status. Adjustment of status is, therefore, a matter of administrative grace, not mere statutory eligibility." *In re Marques*, 16 I. & N. Dec. 314, 315 (B.I.A. 1977) (citations omitted). As this Court has recognized in a related context, "[statutory] eligibility in no way limits the considerations that may guide the Attorney General in exercising [his] discretion to determine who, among those eligible, will be accorded grace." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 31 (1996).

Petitioner's claim (Pet. 6) that "the grant of a INA § 212(i) waiver precludes a discretionary denial of adjustment of status on the basis of fraud since the fraud was waived by the waiver" lacks merit. Petitioner cites no legal authority to support his argument, and administrative and judicial precedent compels the contrary conclusion. The grant of a waiver of inadmissibility based on certain underlying conduct simply does not preclude the agency from considering that same conduct in making other discretionary determinations. See *Yueh-Shaio Yang*, 519 U.S. at 30-31 (deciding that the Attorney General has the authority to consider any and all negative factors, including the applicant's initial fraud, in deciding whether or not to grant a discretionary waiver); *In*

re Tijam, 22 I. & N. Dec. 408, 416-417 (B.I.A. 1998) (same).

For example, it is well-settled in the context of former Section 212(c) of the INA that a waiver of inadmissibility does not excuse the underlying conduct itself or preclude courts from relying on that conduct in making other discretionary determinations.[5] As the BIA explained in *In re Balderas*, 20 I. & N. Dec. 389 (1991), a conviction that was a basis for deportability in an initial proceeding could again be alleged as a basis for deportability in a second proceeding, even though the first proceeding was terminated by a grant of relief under former Section 212(c). Although "a grant of section 212(c) relief 'waives' the finding of excludability or deportability," it does not waive "the basis of the excludability itself," and "the crimes alleged to be grounds for excludability or deportability do not disappear from the alien's record for immigration purposes." *Id.* at 391. Several courts of appeals, including the Eighth Circuit, have agreed. See, *e.g.*, *Peralta-Taveras* v. *Attorney Gen.*, 488 F.3d 580, 584-585 (2d Cir. 2007); *Becker* v. *Gonzales*, 473 F.3d 1000, 1003 (9th Cir. 2007); *Amouzadeh* v. *Winfrey*, 467 F.3d 451, 458-459 (5th Cir. 2006); *Munoz-Yepez* v. *Gonzales*, 465 F.3d 347, 350 (8th Cir. 2006); *Rodriguez-Munoz* v. *Gonzales*, 419 F.3d 245, 248 (3d Cir. 2005).

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[5] Former Section 212(c) provided that:

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unreliquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to [certain specified grounds for exclusion enumerated in Section 212(a) of the Act, including criminal and related grounds].

8 U.S.C. 1182(c) (1994) (repealed).

That reasoning applies with equal force in the context of Section 212(i) relief. Just as former Section 212(c) relief was available to certain classes of aliens who were to be "excluded from admission into the United States," 8 U.S.C. 1182(a) (1994), Section 212(i) relief is available to a certain class of aliens who are otherwise "ineligible to be admitted to the United States," 8 U.S.C. 1182(a) (2000 & Supp. V 2005). Thus, the grant of a waiver of inadmissibility under Section 212(i) does not, as petitioner implies, somehow eradicate his previous fraud. Rather, the waiver merely has the effect of eliminating the ground of inadmissibility created by petitioner's underlying fraudulent conduct. As the BIA has explained, "the request for a waiver of inadmissibility pursuant to section 212(i) of the Act is a request for prospective relief. It is *not* designed to remedy the past but *only* to affect petitioner's future status with respect to the legality of his presence in the United States." *In re Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 564 (1999) (internal quotation marks and citation omitted; emphasis added).

Here, the IJ concluded that the hardship that removal would cause to petitioner's family warranted a waiver of inadmissibility under Section 212(i) so that petitioner would not be *permanently* barred from becoming a permanent resident. Pet. App. 18a. But the IJ also concluded, under Section 245, that petitioner was undeserving of a discretionary adjustment of status at this time because he showed no remorse for his numerous and recent instances of fraud. *Id.* at 18a-19a. Those decisions were consistent, because the Section 212(i) determination focused on whether the applicant's family members would suffer "extreme hardship" if he returned to China, *In re Cervantes-Gonzalez*, 22 I. & N. Dec. at 565-

566, while the determination whether to grant discretionary relief under Section 245 concerned whether petitioner himself was deserving of admission into the United States as a lawful permanent resident, *In re Arai*, 13 I. & N. Dec. at 495-496. Both determinations, moreover, were well within the IJ's broad discretionary authority.

4. Finally, even if petitioner's claim that the agency was required to grant him a discretionary adjustment of status had merit, this case would be an inappropriate vehicle for addressing it, because petitioner's failure to voluntarily depart means that he can no longer obtain adjustment of status. Before the administrative agency, petitioner requested and was granted 30 days to voluntarily depart the United States in lieu of removal. Pet. App. 7a-8a. Petitioner was specifically notified of the consequences of failing to comply with his voluntary departure order, including that he would "be ineligible" to obtain Section 245 relief "for a period of 10 years." *Id.* at 8a. Nonetheless, petitioner failed to depart within the 30 days allowed by the agency. Therefore, petitioner is statutorily ineligible for adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005) ("[i]f an alien is permitted to depart voluntarily * * * and fails voluntarily to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible, for a period of 10 years" to receive certain forms of discretionary relief, including adjustment of status); see 8 C.F.R. 1240.26(a). Further review of petitioner's claim is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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